NO. 83-527

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL MOORING & MARINE, INC., ET AL
Petitioners

versus

DEBORAH M. BERTRAND, ET AL
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION
TO THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals properly concluded that the seaman status of workers who were "continuously subjected to the perils of the sea like blue water seamen and [were] engaged in classical seaman's work"[1] presented a question of fact for the jury.

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1 *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 243, 245 (5th Cir., 1983), quoting the district court decision, 517 F.Supp. 342, 348 (W.D. La. 1981).

LIST OF PARTIES

The following are the parties to this proceeding in the United States Court of Appeals for the Fifth Circuit:

Deborah M. Bertrand, personal representative of Emile Bertrand, III, Plaintiff-appellant

Lisa A. Bertrand, personal representative of Paul Anthony Bertrand, Plaintiff-appellant

Marilyn Emery Smith and Lawrence Emery, surviving parents of William D. Emery, Plaintiffs-appellants

Shmuel Mezan, Plaintiff-appellant

Fidelity & Casualty Company, Defendant-appellant

International Mooring & Marine, Inc., Defendant-appellee

American General Insurance Company, Defendant-appellee

Arkwright-Boston Manufacturers Mutual Insurance Company, Defendant-appellee

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Deborah M. Bertrand, et al, respectfully request that the Court deny the petition for certiorari seeking review of the Fifth Circuit Court of Appeals' decision in this case.

STATEMENT OF THE CASE

This litigation arose from a traffic accident that killed three marine workers and seriously injured a fourth.[2] These workers were members of an anchorhandling crew employed by petitioner-defendant International Mooring & Marine, Inc. (IMM). They were returning home from a one-week voyage aboard a specially equipped vessel handling the anchors of a drilling barge being relocated offshore. Four separate seamen's suits, instituted in the United States District Court for the Western District of Louisiana, were consolidated for trial. All plaintiffs moved for summary judgment that they were in the course and scope of their employment as seamen at the time of their injuries. Defendants (IMM and its insurers) filed cross motions for summary judgment, contending that, as a matter of law, plaintiffs were not seamen.

The district court concluded that plaintiffs were in the course and scope of their employment when injured,[3] a conclusion not at issue here.[4] It made findings of fact that plaintiffs' work as anchorhandlers for IMM (a company specializing in the anchoring and mooring of offshore drilling barges and tender vessels)[5] took plaintiffs to sea aboard specially equipped vessels for 90% of their working time (with the other 10% being spent readying equipment for the

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2 The surviving worker and the deceased workers are collectively called "plaintiffs" in this brief.

3 517 F.Supp. at 344.

4 700 F.2d at 243, n. 5.

5 517 F.Supp. at 344.

offshore voyages);[6] that plaintiffs went to sea on these specially equipped vessels for the duration of the vessels' voyages or missions, working, living, eating, and sleeping aboard until the mission of the vessel was conpleted;[7] and that plaintiffs were "continuously subjected to the perils of the sea like blue water seamen and [were] engaged in classical seaman's work."[8] Despite these findings, the district court denied plaintiffs' motions for summary judgment on seaman status and granted defendants' motions, reasoning that the law of the Fifth Circuit required that a seaman not assigned to a single vessel be assigned to a group of vessels "under common ownership or control."[9]

Reversing and remanding for trial on the issue of seaman status, the Fifth Circuit Court of Appeals held that, while common ownership or control of the vessels to which a worker is assigned is sometimes a factor supporting seaman status,[10] it is not required for workers who continuously go to sea,[11] perform actual navigational duties,[12] and remain with the vessel for the duration of its voyage or mission.[13] Noting that the employer's contractual arrangements with its customers, not the nature of plaintiffs' work,

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6 517 F.Supp. at 344.

7 517 F.Supp. at 344.

8 517 F.Supp. at 348.

9 517 F.Supp. at 347.

10 700 F.2d at 244 - 45.

11 700 F.2d at 245, 247.

12 700 F.2d at 247.

13 700 F.2d at 248.

had determined that the vessels on which plaintiffs worked would not be under "common ownership or control,"[14] the Court held that "[i]n light of the purposes of the Jones Act, we will not allow employers to deny Jones Act coverage to seamen by arrangements with third parties regarding the vessel's operation or by the manner in which work is assigned."[15]

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITION.

The criteria used by the court below for determining seaman status clearly distinguish seamen, including the plaintiffs, from longshoremen and other harbor workers. If plaintiffs' employer had owned a vessel or group of vessels for plaintiffs to use in performing their anchorhandling duties, there would be no question about seaman status. Plaintiffs went to sea with these specially equipped vessels, and remained aboard them, working, eating, and sleeping there, for the entire duration of the vessel's mission. They were seamen who took short voyages into the ocean in order to perform the specific navigational task of moving floatable offshore drilling rigs, barges, and tender vessels. They were "continuously subjected to the perils of the sea like blue water seamen and [were] engaged in classical seaman's work."[16]

The only problematic feature of the case is one brought

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14 700 F.2d at 245.

15 700 F.2d at 245, 248.

16 700 F.2d at 243, 245, quoting district court decision at 517 F.Supp. 348.

about by the employer: the vessels from which plaintiffs performed their navigational work were not owned by the employer, but were furnished by the customer (the operator of the drilling barge to be relocated) or were chartered by the employer for the specific job. As pointed out by the Court of Appeals, this was the employer's choice, not something dictated by the nature of plaintiffs' work.[17] It would be poor policy to permit these contractual and consensual arrangements between the employer and third persons to defeat Jones Act seaman status for defendant's employees. As stated by the Court of Appeals:

> "In light of the purposes of the Jones Act, we will not allow employers to deny Jones Act coverage to seamen by arrangements with third parties regarding the vessel's operation or by the manner in which work is assigned."[18]

> "[E]mployers cannot prevent seamen from recovering under the Jones Act by assigning them to different vessels or by making arrangements with third parties concerning the operation or navigation of the vessels upon which they serve."[19]

In reaching its decision that plaintiffs are entitled to trial on the issue of seaman status, the Court of Appeals relied on the following criteria, all well supported by circuit court jurisprudence. (1) Summary judgment or directed verdict on seaman status is rarely appropriate, because it is ordinarily a

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17 700 F.2d at 245.

18 700 F.2d at 245.

19 700 F.2d at 248.

question of fact for the jury.[20] (2) A worker assigned to a group of vessels, performing seaman's work thereon, can be as much a seaman as is a worker assigned to a single vessel.[21] (3) Certainly the employer cannot be permitted to defeat seaman status for its employees by the simple expedient of contracting for them to perform their seaman's work aboard a group of vessels chartered or borrowed by it.[22] (4) Plaintiffs were "regularly and continuously assigned to vessel-related activity. * * * [P]laintiffs' entire employment involved preparing to work or working from a vessel."[23] (5) Plaintiffs' duties were "truly navigational".[24] (6) "]P[laintiffs' tour of duty with a vessel was for the duration of the vessel's mission. * * * [T]he mission of the vessel and the plaintiffs' job were coextensive; when plaintiffs finished their responsibilities, the vessel's mission was completed."[25]

No court could have difficulty with the question of seaman status for a longshoreman, who happens to go aboard many vessels to perform his work, because of the instant decision of the Court of Appeals. Plaintiffs in this case are men who went to sea aboard, and do virtually all of their work from, vessels especially equipped and furnished to plaintiffs for the task of moving the anchors of and thereby assisting in the movement of the specialized vessels used

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20 700 F.2d at 244.

21 700 F.2d at 244 - 46.

22 700 F.2d at 245, 248.

23 700 F.2d at 247.

24 700 F.2d at 247.

25 700 F.2d at 248.

in drilling for oil and gas offshore. This is navigational work by any sensible definition of navigation. No longshoreman or harbor worker does anything like that. Furthermore, plaintiffs' involvement with each vessel was for the entire duration of each vessel's mission or voyage; no longshoreman or harbor worker is similarly situated with respect to any vessel or group of vessels.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S SEAMAN STATUS DECISIONS

The Petition for Certiorari creates the impression that the Court of Appeals in this case applied some brand-new test for determining seaman status. In fact, the decision below is an unremarkable application of the seaman status criteria established by the Fifth Circuit's leading seaman status decision, *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir., 1959). In that case, the Fifth Circuit Court painstakingly analyzed this Court's seaman status decisions, including *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), the only case cited by the Petition in support of its assertion that the decision below conflicts with this Court's law of seaman status. Particularly noting the modification of *Bassett* that occurred in this Court's subsequent decision in *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957),[26] the Fifth Circuit concluded that synthesis of this Court's status decisions yielded the following criteria:

> "[T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was

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26 *Offshore Company v. Robison*, 266 F.2d 769, 776 - 77 (5th Cir., 1959).

> assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips."
> 266 F.2d at 779.

In the present case, the Court of Appeals concluded that plaintiffs satisfied both *Robison* criteria. (1) The "permanent assignment" prong of the first criterion was satisfied by the fact that plaintiffs, who actually went to sea and ate and slept aboard the vessels, remained with each vessel for a tour of duty that was coextensive with the duration of the vessel's mission.[27] The Court stated that the permanent assignment criterion is "meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for a relatively short period of time."[28] (2) The second *Robison* criterion was satisfied because plaintiffs' duties "clearly contributed to the accomplishment of the vessel's mission, the relocation of the drilling barge."[29]

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27 700 F.2d at 247 - 48.

28 700 F.2d at 247.

29 700 F.2d at 246.

This Court's seaman status decisions fully support the Fifth Circuit's *Robison* test and its application in the present case. *South Chicago Coal & Dock Co. v. Bassett, supra,* the only Supreme Court case relied upon by the Petition, is the earliest of four decisions by this Court involving the criteria for determining when a worker is a seaman. It is the only one of the four in which this Court concluded that the worker might be found not to be a seaman, and the context in which that conclusion was reached is wholly unlike the present case. The *Bassett* claimant sought Longshoremen's Act benefits, not seaman's rights. The Deputy Commissioner, charged under the Longshoremen's Act as it then read with the responsibility of fact-finding and interpretation, had found that claimant was entitled to benefits, despite the argument that he was excluded from coverage as a "member of a crew of [a] vessel." In upholding the Deputy Commissioner's conclusion as a reasonable interpretation of the facts, this Court stressed that it was not interpreting the Jones Act or any other statute, but only the Longshoremen's Act:

> "Recently, in considering the application of the Jones Act to 'any seaman,' we adverted to the 'range of variation' in the use of the word 'crew,' and it was. . . emphasized that what concerned us in that case . . . was 'not the scope of the class of seamen at other times and in other contexts.' We said that our concern there was 'to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained.' [Citation.] That is our concern here in construing this particular statute- - the Longshoremen's and Harbor Workers' Compensation Act - - with appropriate regard to its distinctive aim. We find little aid in considering the use of the term 'crew' in other statutes

having other purposes."
309 U.S. at 259-60.

Bassett is thus not in point: Affirming Longshoremen's Act coverage on the view that a reasonable fact-finder could conclude that claimant was not a member of a crew of a vessel is not authority for denying Jones Act coverage in the present case. In addition, the facts of the *Bassett* claimant's work were wholly different from plaintiffs' duties. The *Bassett* claimant was not engaged in classical seaman's work and was not subjected to seaman's dangers. The Petition for Certiorari itself (pp. 10-11) states the facts of *Bassett* in such a way as to reveal that *Bassett* was principally a harbor worker, who did very little if any of the kind of work traditionally associated with the movement of vessels.

Furthermore, *Bassett* was significantly modified by this Court's subsequent seaman status decisions. In *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957), plaintiff was a handyman for an anchored dredge, injured in a shed ashore. He worked an eight-hour day and went home at night. The dredge never moved during plaintiff's entire period of employment. Plaintiff had no navigational duties of any kind. Upholding a jury verdict that plaintiff was a Jones Act seaman and reversing a state court of appeals decision to the contrary, this Court stated:

> "[W]e believe. . . . that our decision in *South Chicago Co. v. Bassett* . . . . has not been fully understood. Our holding there that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final

> if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate.
>
> Because there was testimony introduced by petitioner tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigational function when the dredge was put in transit, we hold there was sufficient evidence in the record to support the finding that petitioner was a member of the dredge's crew."
> 352 U.S. at 374.

There is nothing in the *Bassett* decision that calls into question any aspect of the decision below. Furthermore, the decision below is fully supported by the later *Senko* decision.[30] Hence, the Petition for Certiorari is mistaken in asserting that the decision below conflicts with this Court's seaman status decisions.

III. THE DECISION BELOW DOES NOT CONFLICT WITH THE THIRD CIRCUIT'S SIMKO DECISION

The Petition claims that the decision below conflicts with *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960 (3rd Cir., 1979). The *Simko* plaintiff was a barge cleaner, who was never involved in the handling or maneuvering of any barge, and whose entire work was cleaning barges that never moved

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30 The *Senko* approach, that a Jones Act Jury case is presented if reasonable persons could find plaintiff had actual or potential significant navigational duties, was reaffirmed in *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 253 (1958); See also *Gianfala v. Texas Co.*, 350 U.S. 879 (1955).

at any time plaintiff was aboard. 594 F.2d at 964. Obviously, there is no conflict presented by the facts of the two cases.

Nor is there any conflict on the language and doctrine of the two decisions. The Third Circuit's test for seaman status is stated as follows:

> "[A] maritime worker who does not actually go to sea but who is injured while performing duties on a navigable vessel must establish that he performed significant navigational functions with respect to that vessel in order to recover under the Jones Act." 594 F.2d at 965.

Plaintiffs in this case went to sea. Furthermore, they have navigational duties and performed "classical seaman's work."[31] They were "continuously subjected to the perils of the sea like blue water seamen."[32] Hence, the asserted conflict with *Simko* is illusory.

CONCLUSION

The Petition for Certiorari mischaracterizes the facts and reasoning of the Court of Appeals. It mischaracterizes this Court's *Bassett* decision, and ignores subsequent decisions of this Court clarifying the meaning of *Bassett*. It mischaracterizes the Third Circuit's *Simko* decision. As a result, the question raised by the Petition is not presented. There is no conflict between the decision below and the decisions relied upon by the Petition, and the decision below creates no

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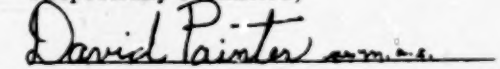
31 700 F.2d at 243, 245.

32 Id.

danger of confusing the line between longshoremen and harbor workers, on the one hand, and seamen, on the other. Under this Court's decisions, especially *Senko*, plaintiffs were entitled to a jury trial on the issue of seaman status, and the holding of the Fifth Circuit was correct. Hence, the petition for Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a member of the bar of this Court and that three copies of the foregoing Brief in Opposition to the Petition for Certiorari have been served by depositing those copies in the United States mail, postage prepaid, addressed to the following parties at the addresses indicated:

Arkwright-Boston Manufacturers Mutual Insurance Company, through its counsel of record, Robert M. Contois, Jr., Jones Walker, Waechter, Poitevent, Carrere & Denegre, 225 Baronne Street, New Orleans, Louisiana 70112;

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The foregoing services were made on behalf of respondents, Deborah M. Bertrand, Lisa A. Bertrand, Marilyn Emery Smith and Lawrence Emery, Shmuel Mezan and Fidelity & Casualty Company, on December 21, 1983.

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